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<b>AMALGAMATED TRANSIT</b>	)	
<b>WORKERS LOCAL 1005</b>	)	
<b>the Union.</b>	)	
	)	<b>ARBITRATION AWARD</b>
	)	
<b>-and-</b>	)	<b>Randy Metzler Grievance</b>
	)	
	)	<b>BMS Case No. 07-PA-0701</b>
<b>METROPOLITAN COUNCIL-</b>	)	
<b>METRO TRANSIT,</b>	)	
<b>the Employer.</b>	)	
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Arbitrator: Barbara C. Holmes

Hearing Dates: April 2, 5 and 17, 2007

Post Hearing Briefs due: May 4, 2007

Date of Decision: May 25, 2007

Appearances:

For the Union: Roger A. Jensen, Attorney at Law  
Jensen, Bell, Converse & Erickson  
St. Paul, Minnesota

For the Employer: Andrew Parker, Esq.  
Parker Rosen  
Minneapolis, Minnesota

## INTRODUCTION

The Amalgamated Transit Workers Local 1005 (herein, the Union), as the exclusive representative, brings this grievance challenging the discharge of its member, Randy Metzler (herein, the Grievant), by the Metropolitan Council (herein, the Employer). The Employer contends that the discharge was for just and merited cause. An arbitration hearing was held at which both parties had a full opportunity to present

evidence through the testimony of witnesses, the introduction of exhibits and the submission of post-hearing briefs.

### **ISSUE**

Did the Employer have just and merited cause to discharge the Grievant? If not, what is the appropriate remedy in this matter?

### **FACTUAL BACKGROUND**

The Employer is a governmental entity that provides public transportation services throughout the greater Minneapolis-St. Paul area. The Grievant has worked for the Employer for twenty-one years as a bus mechanic. His 8-hour shift typically runs from 3:00 p.m. through 11:00 p.m. In addition to his full-time job with the Employer, the Grievant operates an automobile repair business out of a 3-car garage at his residence from 8:00 a.m. until 2:30 p.m.

The Grievant's job as a bus mechanic with the Employer requires him to do all of the mechanical work to keep a bus running, except for engine work and tire maintenance. It requires him to lay on the floor, kneel, get up and down a lot, work hunched over in a 5- foot high pit (the Grievant is 6 ft. 6 in. tall), reach over his head when the bus is on a hoist, lift batteries, alternators, windshields, etc., move buses in and out of the shop, and test drive buses.

On September 19, 2006, the Grievant suffered a work-related injury. While walking around a bus that was up on a hoist, the Grievant tripped and fell against the bike

rack that is mounted on the front of the bus. He received a 2-centimeter laceration on his forehead and was taken to the emergency room.<sup>1</sup>

The emergency room report set forth a diagnosis of a “closed head injury” and a “facial laceration, intermediate complexity.” After the laceration was sutured the Grievant was prescribed a pain reliever and told to follow up with his primary care doctor as needed. On September 22, 2006, the Grievant went to see his primary care doctor. The notes from that visit state that the Grievant reported experiencing headaches, dizziness and visual blurring. Although the neurological tests performed by the doctor were all negative, the doctor mentioned the possibility that the Grievant had a concussion. The doctor gave the Grievant a written work excuse through September 27, 2006.

On September 29, 2006, the Grievant returned to his primary care doctor and reported that he was experiencing headaches, visual blurring, dizziness, and felt unsteady. Except for the observation of “tandem gait minimally unsteady,” the neurological tests performed by the doctor were all negative. The doctor’s notes stated, “may consider an MRI of brain, possible neurological consult, PT, etc.” The Grievant was given a written work excuse through October 8, 2006.

On October 13, 2006, the Grievant visited his doctor and reported slurred speech, unsteadiness, visual blurring, headaches, memory lapses and difficulty concentrating. Except for “a tandem gait slightly unsteady”, the tests performed by the doctor produced negative results. The Grievant also informed the doctor that he had not been driving.

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<sup>1</sup> At the arbitration hearing the Grievant also claimed that in addition to falling against a bike rack he also fell to the ground and hit his head on the concrete floor. This assertion was not supported by any of the various medical and workers’ compensation-related documents created at the time of the injury.

The doctor's notes state that "may consider neuropsychiatric testing... doubt he has chronic subdural but may need to consider MRI." The Grievant was given a written work excuse through November 11, 2006.

Because the Grievant's injury was work-related and covered by workers' compensation, the Employer directed its Risk Management Division to monitor the case. Although the Employer had notes from the doctor indicating that the Grievant should not return to work, the Risk Management Division chose to conduct surveillance of the Grievant because of the length of his absence and the nature of the injury. On October 24, 2006, and November 1 and 2, 2006, a surveillance videotape was made from an investigator's vehicle that was parked across the street from the Grievant's automobile repair business.

On October 27, 2006, the Grievant's direct supervisor, who was unaware that the surveillance was taking place, contacted the Grievant by telephone to inquire as to his status and to discuss the possibility of the Grievant returning to work to perform light-duty tasks. The Grievant told his supervisor that he was unable to drive due to the medicine he was taking, that he was dizzy and that he could not bend over. The supervisor interpreted that response to mean that the Grievant was unable to perform any light-duty work.

At the Grievant's doctor visit on November 16, 2006, the Grievant reported that his symptoms were diminishing. The doctor released the Grievant to return to work starting with 4-hour days for two weeks then increasing to 6-hours days. He was directed not to climb ladders, lift more than 50 lbs., or drive a bus outside of the Employer's garage.

On November 17, 2006, the Employer provided the Grievant and the Union with a “Notice of Discharge” informing the Grievant that he was being terminated from employment for violating several policies regarding the falsification of information. A meeting to discuss the matter was scheduled for November 20, 2006, and ultimately held on November 22, 2006, resulting in the Grievant’s termination.

On November 30, 2006, the Grievant visited his doctor and informed him that he had been terminated for bending over a vehicle to replace its battery and for doing some driving. After the usual examination the doctor again told him that he could return to part-time work and advance to full time work. The doctor cleared him to drive and climb on ladders and concluded he had reached maximal medical improvement.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> step grievance meetings were held, with the Employer denying the grievance at each step and the Union appealing the matter to arbitration.

### **POSITION OF THE PARTIES**

**Employer:** The Employer argues that the surveillance videotape clearly shows that the Grievant was capable of performing some level of work for the Employer. It argues that the Grievant lied to his doctor so that he could continue to conduct his home-based automobile repair business while collecting workers’ compensation benefits. In particular, the Employer points to the Grievant’s failure to tell his doctor that he was working at his automobile repair business during the same time that the doctor was giving him leave from his work duties with the Employer.

The Employer argues that the Grievant lied about his physical condition and restrictions when his supervisor contacted him on October 27, 2006, about returning to

work in a light-duty status. It argues that the surveillance videotape shows the Grievant performing the activities he told his supervisor he could not do – specifically, bending over and driving.

The Employer also argues that the Grievant intentionally concealed that he was working at his automobile repair business while receiving workers' compensation benefits. The Employer contends that if the Grievant had reported these earnings his workers' compensation benefits would have been reduced.

**Union:** The Union contends that the Grievant has not made any false, dishonest or fraudulent statements to the Employer. Even though there is no mention in the initial medical reports that the Grievant hit his head on the concrete floor in addition to falling against a bike rack, it argues that common sense suggests that when a 320 lb. person trips and falls there is a likelihood that he will hit his head on the floor.

The Union also believes that the Grievant did not withhold information in the workers' compensation process that he had other employment because everyone at work knew that he operated an automobile repair business out of his home. The Union explains that in his statement to his supervisor on October 27, 2006, that he could not drive, he was referring to his inability to drive a bus not an automobile. Finally, the Union argues that nothing shown on the surveillance videotape contradicts that Grievant's October 27, 2006, statement that he could not bend over.

The Union claims that the Grievant did not refuse light-duty work when contacted by the Employer. It asserts that the Grievant merely informed his supervisor that he was dizzy and could not drive or bend over. It faults the Employer for making an unfounded assumption that the Grievant was refusing light-duty work.

The Union believes that the Workers' Compensation Court should resolve the issues regarding the extent of the Grievant's injuries and whether or not he was unable to perform his work duties with the Employer. The Union asks that the Grievant be reinstated with back-pay, lost seniority and other benefits from November 30, 2006, the date the doctor said the Grievant was fit to return to his job.

## **DISCUSSION AND OPINION**

Article 5, Section 1, of the parties' collective bargaining agreement requires the Employer to have just and merited cause when it disciplines an employee. The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 905 (5<sup>th</sup> ed. 1997).

### **A. The Alleged Misconduct**

The Employer discharged the Grievant for violating the following policies:

#### **1) CODE OF CONDUCT: GENERAL**

The following actions are considered serious and violations may result in disciplinary action up to and including dismissal.

- A. Falsification ... of any statement, record or report.

...

## 2) **EMPLOYEE CONDUCT – Section/Number 4-6**

### I. Policy

...

Any individual found through an inquiry to have violated the employee conduct policy in the performance of their job, in the employment setting or while on council premises, shall be subject to disciplinary action up to and including discharge.

...

### III. Definitions

...

### D. Unethical Behavior

*Unethical behavior* may include, but is not limited to ... falsification or misrepresentation of information, ... fraud.

## 3) **PROCEDURE – Code of Ethics**

### I. Policy

...

Any individual found through an inquiry to have violated the employee conduct policy in the performance of their job, in the employment setting or while on Council premises, shall be subject to disciplinary action up to and including discharge.

### II. Code of Ethics

...

### B. Falsification of Misrepresentation of Information.

No employee or applicant for employment may intentionally provide information he/she knows to be false to the Council, its employees or agents, or members of the public.

To prove its position the Employer relies upon the surveillance videotape to establish that the Grievant was capable of returning to work despite his assertions to the contrary. Because he was capable of returning to work, the Employer claims that he violated the above-noted policies by falsifying or misrepresenting information to his doctor and supervisor. The Employer also claims that the Grievant falsified or



misrepresented information in obtaining workers' compensation benefits by failing to disclose the income he was receiving from his automobile repair business.

The Union relies on medical information to prove that the Grievant was incapable of returning to work but justified in performing the activities shown on the surveillance videotape. The Union also claims that because the Employer was aware the Grievant operated a business out of his home, he cannot be accused of withholding information regarding this income.

1. The Surveillance Videotape. On October 24, 2006, a videotaped surveillance was conducted from across the street of the 3-car garage that houses the Grievant's automobile repair business. Based upon my observation of the videotape and the testimony of the witnesses, I find that the following relevant activities occurred during the 2-½ hour surveillance period:

- 12:57 p.m.: Surveillance commences
- 1:00 p.m.: Grievant leaves in a customer's vehicle to perform a test drive. Grievant's sole employee leaves in a different vehicle.
- 1:02 p.m.: Grievant returns and places the vehicle inside of the garage. Grievant's employee returns in the same vehicle.
- 1:06 p.m.: Overhead garage door opens and Grievant backs out the same vehicle and leaves to take the vehicle to an alignment business. The employee again leaves in a different vehicle.
- 1:22 p.m.: Auto parts vendor arrives. Customer #1 arrives. Employee returns. Overhead garage door opened. Employee inside garage with parts vendor.
- 1:24 p.m.: Employee looks under hood of Customer #1's vehicle.
- 1:32 p.m.: Grievant returns in a PT Cruiser and carries in a parts box.
- 1:35 p.m.: Overhead garage closes.
- 1:36 p.m.: Customer #2 arrives and goes into the garage through the side entrance. Grievant and Customer #2 come out of side entrance and Grievant drives Customer #2 home in the PT Cruiser and performs a test drive on the PT Cruiser. Parts vendor leaves.
- 1:40 p.m.: Customer #3 drops off the Grievant's red pickup that was lent to him by the Grievant.
- 1:48 p.m.: Grievant returns in the PT Cruiser.
- 2:08 p.m.: Customer #4 arrives in a damaged snowplow truck and leaves

5 minutes later.

2:30 p.m.: Surveillance ends. Taxicab sitting in the driveway.

On November 1, 2006, the surveillance lasted for 4 hours. Based upon my observation of the videotape and the testimony of the witnesses, I find that the following relevant activities occurred:

- 10:33 a.m.: Surveillance begins. Blue SUV in driveway.
- 10:42 a.m.: Parts delivery truck arrives, drops off part and leaves.
- 10:48 a.m.: Customer #1 (who is the employee's son) arrives in a white vehicle that he parks in the driveway. Grievant's employee exits the side door of the garage and proceeds to work under the hood of the vehicle.
- 10:53 a.m.: Customer #2 drops off a green pick-up. Employee still working on white vehicle in the driveway.
- 10:55 a.m.: Parts delivery truck arrives. Employee helps carry in parts. Parts delivery truck leaves.
- 11:19 a.m.: Grievant exits side door of garage and joins his employee and Customer #1 at the white vehicle. Grievant bends over and looks under hood.
- 11:20 a.m.: Grievant returns to the garage through side entrance.
- 11:28 a.m.: Grievant exits side door of garage and again joins his employee and Customer #1 at the white vehicle. For the next 15 minutes, the Grievant is significantly bent over under the hood of the car working deeply within the engine compartment.
- 11:43 a.m.: The Grievant and his employee return to the garage through the side entrance.
- 12:10 p.m.: Customer #3 drops off vehicle. Grievant comes out of the side door of the garage and talks to the customer for several minutes and receives the keys to the vehicle.
- 12:19 p.m.: Customer #4 arrives and goes into the garage through side entrance. When he leaves he drives off in the blue SUV.
- 1:09 p.m.: Overhead door of garage opens. Grievant comes out and moves Customer #3's vehicle to a different place on the driveway.
- 1:13 p.m.: The overhead garage door opens and the Grievant backs a blue Cadillac out of the garage and then moves Customer #2's green pickup out of the driveway. He then puts Customer #3's vehicle into the garage. A different vehicle can be seen on a hoist within the garage. The overhead garage door is closed.
- 2:26 p.m.: Grievant comes out of the side entrance door of the garage and leaves in his personal vehicle.

2:35 p.m.: Surveillance ends.

On November 4, 2006, the surveillance lasted for 4 hours. Based upon my observation of the videotape and the testimony of the witnesses, I find that the following relevant activities occurred:

- 10:07 a.m.: Surveillance begins. The Grievant is inside a customer's vehicle in the driveway. He exits the vehicle and goes into the garage through the side entrance.
- 10:54 a.m.: Grievant takes the green pick-up for a test-drive.
- 11:17 a.m.: Overhead garage door opens and two vehicles can be seen inside.
- 11:31 a.m.: Customer # 1 arrives and leaves in green pickup.
- 11:48 a.m.: Grievant leaves with his employee to pick up a vehicle.
- 12:03 p.m.: Customer #2 attempts to drop off her vehicle but no one is at the business.
- 12:17 p.m.: Grievant returns by himself driving a customer's taxicab.
- 12:19 p.m.: Grievant gets something out of the taxicab.
- 12:23 p.m.: Grievant's employee returns.
- 12:39 p.m.: Red van is in driveway.
- 12:41 p.m.: Overhead garage door opens – Grievant is inside the garage and guides the red van being driven by the employee over a hoist. A white van is also in the garage on a hoist. Overhead door closes.
- 12:44 p.m.: Customer #3 drops off a vehicle that was lent to him by the Grievant.
- 12:50 p.m.: Overhead garage door goes up. Grievant inside the garage moving back and forth in front of two vehicles. Employee leaves in red van. Door closes.
- 12:59 p.m.: Customer #4 arrives. Parts vendor arrives and goes into garage to talk with the Grievant. Customer #3 picks up taxicab.
- 1:07 p.m.: Employee returns
- 1:26 p.m.: Overhead garage door opened while employee moves various parts out of garage. Grievant seen in the garage.
- 1:45 p.m.: Surveillance ends.

Based upon the activities seen in the surveillance videotape I find that the Employer has established a prima facie case that the Grievant was actively participating in his home-based automobile repair business. There was a steady stream of customers and vendors with whom the Grievant was interacting. The Grievant was test driving

vehicles and shuttling customers. Additionally, the Grievant was inside the garage during the entire time of the surveillance. The Grievant claims that, although he was inside the garage, his employee was performing the heavy-duty mechanical work. While it is true that the overhead garage doors were closed throughout most of the surveillance, the Grievant did not present testimony from his employee or any business records to corroborate this assertion.<sup>2</sup>

The Grievant also claims that he was not bending over and working inside the engine compartment of the white vehicle for fifteen minutes on November 1, 2006. He testified that at some point someone brought out a stool and he was sitting on it. I find that the testimony was inconsistent on this point and is not supported by the Grievant's activities that are seen on the surveillance videotape.

Finally, the Grievant's gross income from his business in 2006 exceeds that of 2005, despite the fact that the Grievant was absent from work due injuries or illnesses during the following periods during 2006:

02/23/06:	Workers' Comp -	1 day
03/06/06:	Worker's Comp -	50 days
05/15/06:	Sick -	50 days
07/31/06:	Sick -	1 day
08/01/06:	Worker's Comp	3 days
08/14/06:	Worker's Comp	9 days
09/19/06:	Worker's Comp	43 days
11/17/06:	Discharged	

Lacking any explanation to the contrary, this suggests that the Grievant was actively participating in his business throughout these periods despite his injuries.

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<sup>2</sup> It should also be noted that the Grievant testified that he was aware that he was under surveillance. He explained that he is familiar with all of the vehicles his neighbors drive, and the investigator's black pick-up parked across the street from his garage on 3 separate days did not belong to any of them. Additionally, he could see the pick-up rock occasionally when the investigator was probably moving around.

2. Information provided to the Grievant's doctor. There is no dispute that the Grievant suffered a work-related injury. Furthermore, the Grievant's doctor testified that a concussion could have resulted from such an injury and that the symptoms of a concussion are often manifested subsequent to the initial injury. After the Grievant was terminated the doctor clarified that it would have been acceptable for the Grievant to engage in "moderate activity" as long as it did not make him dizzy. He also stated at the hearing that he did not believe the Grievant should have been performing any "heavy mechanic work" that involved "rapid positional change." Based upon this medical information the Grievant has asserted that he was simply doing what his doctor instructed him to do.

Although the doctor's testimony is highly credible, a serious problem exists. The Grievant did not tell his doctor during *any* of his visits that he was operating his home-based automobile repair business. He never told his doctor what activities he *could* do and *was* doing. If the doctor and the worker's compensation rehabilitation specialist had been made aware of the activities the Grievant was engaging in, they likely would have returned him to some sort of light duty status with the Employer. Because the Grievant offered no credible explanation as to why he withheld this information from his doctor, I find that it was an intentional misrepresentation. The validity of the doctor's diagnosis and recommendations are significantly compromised by this misrepresentation.

3. Grievant's ability to perform light duty. On October 27, 2006, the Grievant's supervisor contacted him by telephone to inquire about his ability to do light-duty work. The Grievant responded that he could not drive, could not bend over and was dizzy. Based upon this response, the Grievant's supervisor did not believe there were any light-

duty tasks suitable for the Grievant. The Employer claims that, based upon the activities the Grievant is seen performing on the surveillance videotape made on October 24<sup>th</sup>, November 1<sup>st</sup>, and November 2<sup>nd</sup>, he misrepresented his condition during this conversation with his supervisor and effectively claimed he could not perform light-duty work. The Union argues that the Grievant did not turn down light-duty work and faults the Employer for making that assumption based upon the symptoms the Grievant reported. The Union points out that the Grievant was never offered a specific light-duty position. The Grievant also stated that when he said he couldn't drive, he meant he couldn't drive a bus – not an automobile.

I find that, although a specific light-duty job was not offered to the G, the telephone call was clearly an inquiry about the Grievant's ability to return in some type of light-duty status. I find both the intent and the effect of the Grievant's response was to say that he was unable to perform light-duty work. I also find that this amounts to an intentional misrepresentation because the surveillance videotape shows the Grievant performing many tasks for his automobile repair business that could have translated to light-duty tasks with the Employer.

The Employer's policy regarding workers' compensation states that "[t]he employee is to return to work as soon as medically possible." In this case the Grievant had previously performed several types of light-duty jobs after earlier work-related injuries. Because he was aware of how the light-duty program worked, he had a responsibility to raise the issue with the Employer. Additionally, the Grievant's doctor testified that if the Grievant had contacted him at the end of October about returning to

light-duty work with the Employer, he would have encouraged him to get back to work as soon as possible.

4. Failure to report income while obtaining workers' compensation benefits. The Employer sent the Grievant a letter dated October 3, 2006, regarding his workers' compensation claim. The letter stated that "[a]ny other employment must be reported to your assigned Claim Representative and also noted on the Employee Injury Report." The Grievant admitted that he did not report any of his income but stated that everyone at work knew he operated a home-based automobile repair business. While this may be true, the Employer did not expect him to be operating his business given his reported injuries. The Grievant had an affirmative duty to report his income. His failure to do so amounts to a misrepresentation and violates the Employer's policies set forth above.

5. Conclusion. I find that the Employer has proved by a preponderance of the evidence that the alleged misconduct occurred. Specifically, the surveillance videotape establishes a prima facie case that the Grievant was capable of returning to work despite his assertions to his doctor and supervisor. Other than his own testimony and the flawed medical evidence, the Grievant has not offered sufficient evidence to overcome the showing by the Employer. The Grievant's failure to inform his doctor of his true activities, his statements to his supervisor, and his failure to report income from his business while receiving workers' compensation benefits amount to misrepresentations that violate the Employers policies noted above.

**B. The Appropriate Sanction.** The Grievant has worked for the Employer for twenty-one years. No previous disciplinary events or problems with his performance

were asserted. A work record of this kind has the potential to mitigate the severe disciplinary penalty of a discharge.

But in this case the Grievant made numerous misrepresentations over a lengthy period of time that enabled him to be absent from work for almost two months. He also failed to report his income while receiving workers compensation benefits, which may have resulted in a wrongful taking of public funds. Discharge is an appropriate sanction under these circumstances.

#### AWARD

The grievance is denied.

DATED: May 25, 2007

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Barbara C. Holmes  
Arbitrator